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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
SACRAMENTO DIVISION

MONICA EISENSTECKEN, et al.,

Plaintiffs,

vs.

TAHOE REGIONAL PLANNING AGENCY, et  
al.,

Defendants.

Case No. 2:20-cv-02349-TLN-CKD

**BRIEF OF DEFENDANTS VERIZON  
WIRELESS AND GUILLIAM NEL IN  
SUPPORT OF MOTION TO DISMISS  
THIRD AMENDED COMPLAINT**

Hearing date: September 22, 2022

Time: 2:00 p.m.

Courtroom: 2

The Honorable Troy L. Nunley

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## INTRODUCTION

Backed by three anti-wireless organizations, plaintiffs’ lawsuit is an effort to force the Tahoe Regional Planning Agency (“TRPA”) and the City of South Lake Tahoe (“City”) to halt the deployment of wireless communications infrastructure and re-write the regulation of all wireless facilities in their jurisdiction to plaintiffs’ satisfaction. Plaintiffs attempt to squeeze this sweeping *legislative* agenda into their (largely belated) attacks on the permits issued by TRPA and the City for two specific facilities, a cell tower on defendant Nel’s property (the “Ski Run Facility”) and a small cell facility that has been legally operating since 2018 (the “2018 Small Cell”), and an unrelated permit for Mr. Nel to remove trees from his property. Through 13 sweeping counts, ranging from violation of the public trust to trespass and assault, and by invoking a veritable alphabet soup of state and federal statutes, plaintiffs’ transparent aim is to “halt” the “blanket implementation of cell tower and antenna approvals and installations” until TRPA and the City adopt a regulatory approach that comports with plaintiffs’ views of the alleged hazards of the radio frequency (“RF”) emissions that all facilities use for wireless communications. Third Amended Complaint, Petition for Writ of Mandate, Declaratory Relief, and Damages (ECF no. 60) (the “TAC”), ¶¶ 6, 8.

Despite its excessive length, plaintiffs’ Third Amended Complaint fails to state a single viable claim for relief and should be dismissed in its entirety for several independent reasons. First, all but one of the 13 claims are based on the overarching claim that RF emissions are harmful to health and the environment. All such claims are expressly or impliedly preempted by the federal Telecommunications Act (the “TCA”) and barred by the exclusive authority Congress has given the Federal Communications Commission (“FCC”) to regulate RF emissions to ensure the operation of an inherently interstate, nationwide network. Second, plaintiffs’ claims are procedurally improper. Plaintiffs failed to provide the statutorily required notice before bringing a claim under the Clean Water Act, and even if plaintiffs had given notice, the allegedly offending tower does not even exist yet, so the claim is not ripe. Plaintiffs’ challenges to the City’s and TRPA’s approval of the 2018 Small Cell and the City’s approval of the Ski Run Facility are also

untimely under the applicable statutes of limitations. Third, neither the ADA nor the FHAA applies to Verizon because it is not a public entity and was not involved in the sale or rental of a dwelling. Fourth, plaintiffs' state tort law claims, in addition to being preempted, fail because exposure to RF emissions within FCC limits is not an actionable tort under California law, and because Verizon's facilities were operated under valid government permits. Fifth, claims based on Mr. Nel's tree removal are moot because the trees have already been removed, and in any event plaintiffs fail to allege any plausible basis for relief against Mr. Nel. Finally, the TAC should be dismissed in its entirety because it violates the requirement for a "short and plain statement of the claim," and "simple, concise, and direct" averments under Fed. R. Civ. Pro. ("Rule") 8.

In short, plaintiffs cannot use this belated, procedurally improper challenge to rewrite federal regulations governing RF emissions, and TRPA's and the City's regulation of all wireless facilities within their jurisdiction. The Court has afforded plaintiffs every opportunity to state a claim, but the Third Amended Complaint does not contain a single viable cause of action. The Court should dismiss this case in its entirety with prejudice.

### **SUMMARY OF THE COMPLAINT AND RELEVANT FACTS**

According to Plaintiffs, "[t]he present litigation is the . . . culmination after several years of many urgent but fruitless appeals at the local municipal, regional, and federal levels. . . . Plaintiffs and innumerable other individuals and groups have strenuously objected to the unbridled rollout of wireless facilities within the Lake Tahoe Basin to TRPA's Board at nearly every one of [their] meetings over the better part of a year." TAC, ¶ 19. Yet plaintiffs did not timely seek judicial review of *any* of those prior decisions. Their state-court lawsuit challenging the City's approval of the Ski Run Facility was dismissed with prejudice as untimely,<sup>1</sup> and the only other prior approvals mentioned in the TAC are the City's and TRPA's separate permits for the 2018 Small Cell nearly four years ago (TAC, ¶¶ 94, 213). The limitations period to challenge a TRPA permit is 60 days after issuance. Tahoe Regional Planning Compact (the "Compact"), Art. VI(j)(4). Any challenge to a City permit must be filed and served on the City within 90 days after

<sup>1</sup> See City's Request for Judicial Notice (ECF no. 63-1), Exhibits A-D.



1 issuance. Cal. Govt. Code § 65009(c)(1)(E). Plaintiffs do not – and cannot – allege that they  
 2 challenged either TRPA’s or the City’s approval of the 2018 Small Cell within the applicable  
 3 limitations period.

4 Instead, their wholesale attack on TRPA’s (and the FCC’s) regulation of wireless facilities  
 5 is premised on TRPA’s approval of the Ski Run Facility, and an unrelated TRPA permit for Mr.  
 6 Nel to remove 31 trees that posed a fire hazard on his property. Plaintiffs argue that the two  
 7 permits were inextricably related and thus evidence of “piecemealing” (TAC, ¶¶ 88-92), but they  
 8 admit that the City ordered Mr. Nel to remove the trees to reduce wildfire risk (TAC, ¶ 21), that  
 9 TRPA’s forester chose the specific trees to be removed (TAC, ¶ 88), and that TRPA’s General  
 10 Counsel and Governing Board determined that the two permits were unrelated (TAC, ¶¶ 90-92).  
 11 They also admit that all 31 trees have since been removed (*id.*, ¶ 92).

12 Plaintiffs have left no doubt that their core concern is the alleged health and environmental  
 13 effects of RF emissions and TRPA’s alleged “institutional blindness to the hazards of pulse-  
 14 modulated wireless radiation.” TAC, ¶ 12. For example, they allege that “TRPA actively  
 15 promotes hazardous wireless infrastructure with no evaluation of the environmental impacts” (*id.*,  
 16 ¶ 16), and that Ms. Eisenstecken was driven from her home by the mere threat that “increased and  
 17 untested RFR exposures [from the as yet unbuilt Ski Run Facility] would have placed her health  
 18 and wellbeing and that of her two young children in immediate jeopardy.” *Id.*, ¶ 21. Plaintiffs  
 19 even allege that the “dangers facing Plaintiff Benedict on account of the wireless radiation being  
 20 transmitted from the [2018 Small Cell] are a matter of life and death.” *Id.*, ¶ 225.

21 Plaintiffs made very similar claims in their first amended complaint (ECF no. 5) (the  
 22 “FAC”). In moving to dismiss that earlier complaint, Verizon and Mr. Nel explained that the FCC  
 23 had long had exclusive authority to regulate RF emissions, which preempted or otherwise barred  
 24 all claims in the FAC. ECF no. 17 at 5-11. Rather than defend the validity of these claims,  
 25 plaintiffs sought and obtained leave to file a second amended complaint (ECF no. 48) (the  
 26 “SAC”), and then a third. In so doing, plaintiffs have abused the Court’s generous approach to  
 27 leave to amend. In addition to adding new parties (plaintiff Benedict and defendant City) and new  
 28

claims (alleged water pollution), each amendment has made the complaint more prolix and less comprehensible. The FAC was 41 pages, the SAC was 80, and the TAC is 114 pages.

### LEGAL STANDARD

Under Rule 12(b)(1), the court must dismiss a complaint for lack of subject-matter jurisdiction if the Plaintiff's claims are not ripe, or if they are moot. *See Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010) (ripeness); *White v. Lee*, 227 F.3d 1214, 1242-44 (9th Cir. 2000) (mootness). If a defendant files a motion under Rule 12(b)(1), the party opposing the motion then bears the burden of establishing the court's jurisdiction. *Chandler*, 598 F.3d at 1122.

To survive a motion to dismiss under Rule 12(b)(6), Plaintiffs must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While the court must accept well-pled allegations as true, this does not apply to "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). Nor does the Court accept allegations that are contradicted by matters of public record or otherwise subject to judicial notice. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). "Where a state law claim is preempted by federal law, that claim must be dismissed for failure to state a claim because the claimant cannot prove any set of facts that will support the claim for relief." *Kent v. DaimlerChrysler Corp.*, 200 F.Supp.2d 1208, 1212 (N.D. Cal. 2002).

An action may also be dismissed under Rule 41(b) if "the plaintiff fails to prosecute or to comply with these rules or a court order." This includes dismissal of a complaint that violates the requirements under Rule 8 for a "short and plain statement of the claim" for relief, and that "[e]ach allegation must be simple, concise, and direct." *See, e.g., Nevijel v. North Coast Life*

*Ins. Co.*, 651 F.2d 671, 673 (9th Cir. 1981) (“A complaint which fails to comply with rules 8(a) and 8(e) may be dismissed with prejudice pursuant to Rule 41(b).”).

### ARGUMENT

Verizon and Mr. Nel join the arguments in TRPA’s and the City’s concurrent motions to dismiss. In addition, the Court should dismiss the TAC for the following independent reasons.

**I. All claims regarding the alleged environmental impacts of RF emissions are either preempted by the Telecommunications Act or barred because they conflict with the FCC’s authority to regulate RF emissions.**

While packaged in various ways among the numerous claims, the gravamen of the TAC is that: (1) RF emissions are allegedly hazardous to human health and the environment; (2) TRPA and the City are required to regulate such impacts in order to comply with the Compact, TRPA’s regulations, CEQA, and a host of federal statutes, but have failed to do so; and (3) exposing plaintiff Benedict to RF emissions constitutes various torts under state law. All but one of plaintiffs’ claims are based on this theory (claim 5 is the sole exception) and as such, they are either preempted by the TCA (as to claims against the City and Verizon) or conflict with the FCC’s regulations establishing safe levels of RF emissions (as to claims against TRPA). Either way, they fail to state a claim for relief.

**A. Congress authorized the FCC to regulate RF emissions to balance competing interests and achieve national uniformity in wireless standards.**

For decades, Congress has given the FCC “comprehensive powers” over all types of radio communications, and the FCC has exercised “federal primacy” over the technical aspects of such communications. *Cohen v. Apple, Inc.*, 2020 WL 6342922, at \*3, \*10 (N.D. Cal. 2020) (describing the background of FCC regulation). Specifically, regarding RF emissions, Congress determined that “it is in the national interest that uniform, consistent requirements, with adequate safeguards of the public health and safety” be established, and it authorized the FCC to adopt regulations that would “ensure an appropriate balance in policy” between the objectives of safety and the rapid deployment of wireless telecommunications services. *Id.* at \*10.

1 As directed by Congress, the FCC issued its RF exposure regulations in 1996, explaining  
 2 that they “provided a proper balance between the need to protect the public and workers from  
 3 exposure to excessive RF electromagnetic fields and the need to allow communications services  
 4 to readily address growing marketplace demands.” *Ibid.* (quoting *In the Matter of Procedures*  
 5 *for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section*  
 6 *332(c)(7)(B)(v) of the Communications Act of 1934*, 12 FCC Rcd. 13494, ¶¶ 5, 29 (FCC rel.  
 7 August 25, 1997)).

8 In the TCA, while Congress preserved traditional state and local zoning authority, it  
 9 expressly prohibited state and local governments from regulating RF emissions based on health  
 10 or environmental impacts:

11 No State or local government or instrumentality thereof may regulate the  
 12 placement, construction, and modification of personal wireless service  
 13 facilities on the basis of the environmental effects of radio frequency  
 14 emissions to the extent that such facilities comply with the Commission’s  
 regulations concerning such emissions.

15 47 U.S.C. § 332(c)(7)(B)(iv). “Environmental effects” as used in the statute include both  
 16 impacts on human health and the wider environment, including plants and wildlife. *See T-*  
 17 *Mobile Northeast, LLC v. Town of Ramapo*, 701 F. Supp. 2d 446, 460 (S.D.N.Y. 2009) (includes  
 18 human health concerns); *Jaeger v. Cellco Partnership*, 2010 WL 965730, \* 10 (D. Conn. 2010)  
 19 (“The plain meaning of the term ‘environmental effects’ incorporates adverse effects on all  
 20 biological organisms”), *aff’d*, 402 Fed.Appx. 645 (2d Cir. 2010), *cert. denied*, 564 U.S. 1038  
 21 (2011).

22 The current RF regulations are located at 47 C.F.R. §§ 1.1307(b), 1.1310, 2.1091,  
 23 2.1093. These regulations “are generally applicable to *all* facilities, operations and transmitters  
 24 regulated by the [FCC],” including cell towers. 47 C.F.R. § 1.1307(b)(1) (emphasis added).  
 25 Thus, both the Ski Run Facility and the 2018 Small Cell are legally required to comply with the  
 26 FCC limits on RF emissions. Notably, plaintiffs do not (and cannot) allege otherwise.

**B. Plaintiffs cannot challenge the FCC regulations in this Court.**

Plaintiffs do not expressly challenge the FCC regulations, and cannot do so (expressly or otherwise) in this Court. *Jaeger, supra*, 2010 WL 965730, \* 10 (“Because Congress has granted the FCC authority to regulate RF emissions from cellular towers, where a party’s true claim is against the FCC and its policies concerning RF emissions, as it is in the instant matter, the proper procedure is to petition the FCC,” and if necessary, seek judicial review in the Court of Appeals). To the extent plaintiffs seek to challenge the FCC regulations, they are in the wrong forum and their claims must be dismissed. *See* 47 U.S.C. § 402(a) (“[a]ny proceeding to enjoin, set aside, annul or suspend any order of the [FCC] . . . shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28”); 28 U.S.C. § 2342 (“the court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the [FCC]. . .”).

**C. All claims based on the City’s failure to regulate RF emissions are expressly preempted by the Telecommunications Act.**

Claims 9-11 are based in part on the contention that the City must deny or revoke wireless facility permits based on their RF emissions. TAC, pp. 96-107. These claims are expressly preempted by the TCA. 47 U.S.C. § 332(c)(7)(B)(iv). Without acknowledging this preemption, plaintiffs attempt to plead around it by arguing that shutting down or relocating the 2018 Small Cell is necessary to grant plaintiff Benedict a “reasonable accommodation” under the ADA or FHAA. TAC ¶¶ 203-18. This argument has no merit. In rejecting a virtually identical claim, the court in *Wolf v. City of Millbrae*, 2021 WL 3727072 (N.D. Cal. 2021), *appeal filed*, 9th Cir. (Oct. 7, 2021), held:

Wolf’s requested accommodation is per se unreasonable. His accommodation request to the City seeks either (1) prohibiting T-Mobile from operating the cell site at its current location or (2) applying RF exposure standards that differ from the standards set by the FCC. The City’s grant of either accommodation would violate the TCA’s protection against local regulation of “the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions” where the facility complies with the FCC’s RF exposure regulations.

2021 WL 3727072, \* 4. Other courts have found similar claims preempted. *See Jaeger, supra*, 2010 WL 965730, \* 4 (claims that town’s approval of tower violated various federal laws due to impact of RF emissions on human health and wildlife held preempted); *Merrick Gables Ass’n, Inc. v. Town of Hempstead*, 691 F.Supp.2d 355, 362-3 (E.D.N.Y. 2010) (dismissing claims based on town’s alleged agreement to adopt a moratorium on wireless facilities because “[the TCA] clearly prohibits Hempstead from preventing the installation of wireless service equipment based on concerns about the health risks associated with the equipment”). To the extent that claims 9-11 are based on the City’s failure to regulate RF emissions, they are preempted and must be dismissed.

**D. Plaintiffs’ state-law claims are preempted because they conflict with the FCC’s RF emissions regulations.**

In counts 1, 4, 8, and 10-13, plaintiffs assert state-law causes of action based on the claim that RF emissions are harmful to human health and the environment. For plaintiffs to succeed on any of these claims, the Court or a jury would have to agree that RF emissions within FCC limits are harmful, and reject the FCC’s determination that facilities that comply with its RF emission regulations are safe. Given that unavoidable conflict between plaintiffs’ claims and the FCC’s regulations, these claims are preempted.

In addition to express preemption in 47 U.S.C. § 332(c)(7)(B)(iv) discussed above, the doctrine of implied conflict preemption and its application to plaintiffs’ state law claims are both well established. Conflict preemption arises when (1) “compliance with both federal and state regulations is a physical impossibility,” or (2) “the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Nat. Fed. of the Blind v. United Airlines, Inc.*, 813 F.3d 718, 724 (9th Cir. 2016) (quoting *Arizona v. United States*, 567 U.S. 387, 399 (2012)). “Federal regulations preempt state laws in the same fashion as congressional statutes.” *Farina v. Nokia, Inc.*, 625 F.3d 97, 115 (3d Cir. 2010).

Here, allowing a judge or jury to second-guess the FCC’s regulations would stand as an obstacle to accomplishing Congress’s stated objective of having a single, nationwide RF emissions standard that balances the competing objectives of safety and promoting the

1 development of wireless telecommunications services. As the Sixth Circuit explained in  
 2 *Robbins v. New Cingular Wireless PCS, LLC*, 854 F.3d 315 (6th Cir. 2017), “by delegating the  
 3 task of setting RF-emissions levels to the FCC, Congress authorized the federal government –  
 4 and not local governments – to strike the proper balance between protecting the public from RF-  
 5 emissions exposure and promoting a robust telecommunications infrastructure.” Further,  
 6 “[a]llowing RF-emissions-based tort suits would upset that balance and impair the federal  
 7 government’s ability to promote the TCA’s goals . . . Widespread litigation would also shift the  
 8 power to regulate RF emissions away from the FCC and into the hands of courts and state  
 9 governments.” 854 F.3d at 319-320.

10 As the Sixth Circuit recognized, it is simply not possible to have a nationwide system of  
 11 RF regulation if a plaintiff can ask a judge or jury to declare the FCC’s regulations inadequate to  
 12 protect public health and the environment. Numerous courts around the country have reached  
 13 the same conclusion. *See Farina, supra*, 625 F.3d at 115 (affirming preemption dismissal of  
 14 putative class action alleging that cell phone antennas expose users to harmful RF emissions);  
 15 *Kaspers v. Verizon Wireless Serv.*, 2021 WL 2193584 at \*2 (N.D. Ga. 2021) (“as multiple courts  
 16 . . . have held, such challenges would effectively allow private plaintiffs to do through law suits  
 17 what state and local governments cannot do through regulation, thereby undermining the FCC’s  
 18 delegated authority”); *Cohen, supra*, 2020 WL 6342922, at \*10 (granting summary judgment to  
 19 Apple, holding that putative class claims based on iPhone RF exposure were preempted);  
 20 *Fontana v. Apple Inc.*, 321 F. Supp. 3d 850 (M.D. Tenn. 2018) (dismissing with prejudice as  
 21 preempted a personal injury action for alleged injuries from RF exposure); *Merrick Gables*  
 22 *Assoc., supra*, 691 F.Supp.2d at 364-6 (dismissing nuisance claim based on RF emissions from  
 23 wireless equipment on utility poles); *Bennett v. T-Mobile U.S.A., Inc.*, 597 F. Supp. 2d 1050  
 24 (C.D. Cal. 2008) (dismissing personal injury claims based on cell phone RF emissions as  
 25 conflict preempted); *Jasso v. Citizens Telecomm. Co. of Cal., Inc.*, 2007 WL 2221031 (E.D. Cal.  
 26 2007) (tort claim based on RF emissions from cell tower dismissed on conflict preemption  
 27 grounds), *R&R adopted*, 2007 WL 2688837 (E.D. Cal. 2007); *Stanley v. Amalithone Realty, Inc.*,  
 28



94 A.D.3d 140, 145 (2012) (“To the extent that a law or regulation of this state conflicts with the [1996 Act] or any of the FCC’s valid regulations under that statute, it is preempted and has no effect.”).

These courts have dismissed a variety of state-law claims, including the same tort claims brought here. *See, e.g., Robbins, supra*, 854 F.3d at 318-320 (nuisance and negligence claims preempted); *Merrick Gables, supra*, 691 F.Supp.2d at 365-366 (private nuisance claim preempted); *Stanley, supra*, 94 A.D.3d at 142, 145 (nuisance, trespass, and assault<sup>2</sup> claims preempted). Regardless of legal theory, *all* of the claims dismissed in the foregoing cases share one thing in common with the Plaintiffs’ claims here: they would impose liability under state law based on the allegedly harmful effects of RF emissions. All such claims are preempted because allowing courts or juries to determine “safe” levels of RF emissions would upset the careful balance struck by the FCC between an efficient, nationwide communications network and the safety of RF emissions. *Cohen, supra*, 2020 WL 6342922 at \*9, \*16 (“[T]he [FCC] intended to create a uniform, nation-wide regime that balanced competing objectives of safety and efficiency. . . . Allowing a federal jury to now second-guess the agency determinations would interfere with the balance struck in the equipment-authorization program. The federal regulations must displace plaintiffs’ claims.”).

**E. All other claims based on allegedly harmful RF emissions are barred because the FCC regulations control.**

Recognizing that their primary claims are preempted, plaintiffs attempt to plead around this fact by alleging that TRPA’s permitting of wireless facilities “is a major federal action,” and that the TCA “does not and cannot preempt the TRPA from conducting its own comprehensive environmental reviews of wireless projects under the Compact, or NEPA, and TRPA is required

<sup>2</sup> Though the assault claim is not mentioned in the Appellate Division decision, it was included among the numerous claims dismissed by the lower court and affirmed by the Appellate Division. *See Stanley v. Amalithone Realty, Inc.*, 31 Misc.3d 995, 998, 1006-1007 (N.Y. Sup. 2011), *aff’d*, 94 A.D.3d 140 (2012).



1 by the Compact to do so in this case.” TAC, ¶¶ 140, 144.<sup>3</sup> In other words, plaintiffs allege that  
 2 TRPA is a federal entity and can set its own RF regulations, and that its failure to second guess  
 3 the FCC regarding the health effects of RF emissions violates the Compact and numerous  
 4 federal statutes.<sup>4</sup> But just as courts and juries may not second-guess the FCC’s RF regulations,  
 5 TRPA cannot do so either, even assuming that any attempt by TRPA to set its own RF standards  
 6 would be equivalent to federal law and therefore not preempted under the Supremacy Clause.<sup>5</sup>

7 When two federal laws are alleged to be in conflict, “then the courts must strive to  
 8 harmonize the two laws, *giving effect to both laws if possible.*” *Swinomish Indian Tribal*  
 9 *Community v. BNSF Rwy. Co.*, 951 F.3d 1142, 1156 (9th Cir. 2020) (quoting *Ass’n of Am. R.R.s*  
 10 *v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010)) (emphasis added).  
 11 Plaintiffs’ proposed interpretation of the Compact and NEPA violates this fundamental rule of  
 12 construction because it would require TRPA to ignore the FCC’s regulations and reach a  
 13 different conclusion as to safe levels of RF emissions.

14 Currently, TRPA’s existing regulations are in complete harmony with the FCC’s  
 15 statutory authority to regulate RF emissions. While TRPA protects the general environment of  
 16 the Tahoe region by regulating impacts on air quality, water quality, and other natural and scenic  
 17 resources, it properly defers to the FCC to regulate RF emissions. Similarly, the other statutes  
 18  
 19  
 20

21 <sup>3</sup> Plaintiffs make clear that the purpose of this “comprehensive review” is to stop deployment of  
 22 wireless infrastructure based on the alleged environmental impacts of its RF emissions. *Id.*, ¶¶ 8,  
 111.

23 <sup>4</sup> Plaintiffs’ argument as to TRPA also implicitly concedes that claims against Verizon and the  
 24 City based on alleged dangers of RF emissions are preempted.

25 <sup>5</sup> While the Compact is considered federal law for jurisdictional and preemption purposes,  
 26 TRPA’s regulations may or may not have such status, depending on the particular regulation. *See*  
 27 *Tahoe Regional Planning Agency v. King*, 233 Cal.App.3d 1365, 1383 (1991) (“[r]egulations and  
 28 ordinances enacted by TRPA pursuant to its powers under the Compact do not automatically  
 acquire the status of federal law”). Without conceding the point, we assume for purposes of this  
 motion to dismiss that if TRPA attempted to regulate RF emissions, those regulations would have  
 the status of federal law for both purposes.

1 cited in the TAC<sup>6</sup> all address some other general concern – such as environmental impacts of  
 2 federal action or protecting the disabled from discrimination – but do not even address RF  
 3 emissions. This is not surprising, because Congress placed responsibility for regulating RF  
 4 emissions and other technical issues related to radio communications solely with the FCC.  
 5 Moreover, contrary to plaintiffs’ assertion, TRPA’s approval of wireless facilities is not a “major  
 6 federal action.” *California Tahoe Regional Planning Agency v. Sahara Tahoe Corp.*, 504  
 7 F.Supp. 753, 763 (D. Nev. 1980) (“the Court rejects plaintiffs’ contention that the nexus between  
 8 TRPA and the federal government renders TRPA’s approval of the Sahara project [a] major  
 9 federal action . . . and finds that TRPA is not subject to the provisions of NEPA”).

10 Interpreting these other general laws, as plaintiffs urge, to require TRPA to regulate RF  
 11 emissions would fail to give effect to the TCA and the FCC’s RF regulations. It would also  
 12 violate the “commonplace of statutory construction that the specific governs the general.”  
 13 *Andrews v. Sirius XM Radio, Inc.*, 932 F.3d 1253, 1263 (9th Cir. 2019) (quoting *Morales v.*  
 14 *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)); *see also Swinomish, supra*, 951 F.3d at  
 15 1160 (“a specific statute will not be controlled or nullified by a general one, regardless of the  
 16 priority of enactment”).

17 There is simply no basis for interpreting any of the statutes Plaintiffs cite as *requiring*  
 18 TRPA to unilaterally upset the careful balance the FCC has struck – at the express direction of  
 19 Congress – between safe levels of RF emissions and the promotion of a robust, nationwide  
 20 communications network. On the contrary, plaintiffs’ theory presents a textbook example of  
 21 why a general statute addressed to a distinct topic (e.g., NEPA) cannot be read to undermine  
 22 Congress’s goal of national uniformity in communications policy, and its very specific direction  
 23 to the FCC to set RF emissions standards to achieve an appropriate balance between competing  
 24 objectives. Plaintiffs’ contrary interpretation would not only invite conflict but require it, and  
 25 their proposed construction of federal statutes fails under established rules of statutory

26  
 27 \_\_\_\_\_  
 28 <sup>6</sup> As discussed in TRPA’s motion to dismiss, CEQA, NEPA, and the APA, all cited in the TAC, do not even apply to TRPA.

1 construction. None of these statutes impose a duty on TRPA to second-guess the FCC's RF  
2 emissions limits, and claims 1-4 and 6-11 fail to state a claim as a result.

3 **II. Counts 5 and 9-13 should also be dismissed because they fail to state any viable**  
4 **claim.**

5 The defenses discussed above bar all of plaintiffs' claims. But the TAC should also be  
6 dismissed in its entirety for the independent reason that it fails to allege "enough facts to state a  
7 claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. This is true for all counts  
8 in the TAC, but this section will focus on counts 5 and 9 through 13, the only ones that purport  
9 to state a claim against Verizon or Mr. Nel.

10 **A. Count 5 must be dismissed for lack of jurisdiction.**

11 The TAC includes an entirely new claim alleging that the City, TRPA, and Verizon are  
12 in violation of "the Federal and State Clean Water Acts." TAC, p. 76. Because the Court lacks  
13 jurisdiction to hear a claim under applicable federal or state water pollution control laws, count 5  
14 must also be dismissed.

15 Congress passed the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1388  
16 ("Clean Water Act" or "CWA"), with the objective of restoring and maintaining the "chemical,  
17 physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve that  
18 objective, the Clean Water Act established requirements related to wastewater treatment, water  
19 quality, and, most relevant to count 5, the discharge of pollutants to "waters of the United  
20 States." *See, e.g.*, 33 U.S.C. §§ 1281 (publicly owned treatment works), 1311 (effluent  
21 limitations), 1342 (National Pollutant Discharge Elimination System ("NPDES") permits).  
22 While the United States Environmental Protection Agency ("the EPA") was initially tasked with  
23 implementing the CWA nationally, that authority transfers to a state government upon a showing  
24 that state law provides adequate authority to implement the requirements of the Act. *Id.* at §  
25 1342(b). Within California, the EPA has delegated responsibility for implementing the NPDES  
26 permitting program to the California State Water Resources Control Board and the nine  
27 Regional Water Quality Control Boards that operate underneath the State Board (collectively,  
28

1 the “Water Boards”). *See* California State Water Resources Control Board, “National Pollutant  
 2 Discharge Elimination System (NPDES) – Wastewater,” available at  
 3 [www.waterboards.ca.gov/water\\_issues/programs/npdes/](http://www.waterboards.ca.gov/water_issues/programs/npdes/) (visited July 20, 2022).

4 The Clean Water Act provides limited authorization for citizens to commence a civil  
 5 action in an appropriate federal district court against any person who is alleged to be in violation  
 6 of an effluent standard or limitation, or order related thereto – but that authorization is not  
 7 absolute. 33 U.S.C. § 1365. The Act specifies that no such civil action may be filed until 60  
 8 days *after* the date on which the citizen provides notice of the alleged violation to the EPA, the  
 9 relevant state environmental agency (here, the State Water Resources Control Board), and the  
 10 alleged violator(s). *Id.* At § 1365(b). Under Ninth Circuit precedent, the requirement to provide  
 11 notice of the alleged violation prior to commencing a civil action is jurisdictional – “when a  
 12 party fails to give notice, the court must dismiss the claim.” *Tan Phu Cuong Inv. LLC v. King*  
 13 *Cty.*, 831 Fed.Appx. 235 (9th Cir. 2020), citing *Center for Biological Diversity v. Marina Point*  
 14 *Development Co.*, 566 F.3d 794, 800 (9th Cir. 2009).

15 The TAC does not allege that plaintiffs have complied with the notice requirement in 33  
 16 U.S.C. § 1365. Because plaintiffs do not allege compliance with this jurisdictional requirement,  
 17 this Court lacks jurisdiction over the claim that defendants are in violation of the Clean Water  
 18 Act and count 5 must be dismissed under Federal Rule of Civil Procedure 12(b)(1).

19 The State of California has also adopted water quality requirements that go beyond the  
 20 requirements of the Clean Water Act in the Porter-Cologne Water Quality Control Act (“Porter-  
 21 Cologne Act”). To the extent count 5 includes a claim based on an alleged violation of  
 22 California State law that would not be subject to the Clean Water Act’s notice requirement, this  
 23 Court would lack jurisdiction to hear such a claim as well. The TAC offers no basis for this  
 24 Court’s jurisdiction over an alleged violation of a state-only provision of the Porter-Cologne Act  
 25 – and nor could it. Section 13361 of that Act limits the authority to file a civil action to address  
 26 an allegedly unauthorized discharge to the California Attorney General and directs that such  
 27 complaints must be filed in the California State court for the county where the discharge is  
 28

1 alleged to have been made. California Water Code § 13361. Because there is no basis for this  
 2 Court to exercise jurisdiction over an alleged violation of a State-only provision of the Porter-  
 3 Cologne Water Quality Control Act, to the extent such a claim is included in count 5, it also  
 4 must be dismissed under Federal Rule of Civil Procedure 12(b)(1).

5 If the Court concludes that it lacks subject matter jurisdiction, “the court must dismiss the  
 6 action” and no further inquiry need be conducted. F.R.C.P. 12(h)(3). Should the Court find that  
 7 it does have jurisdiction to hear count 5, however, the Court still must dismiss the claims  
 8 included in count 5 under F.R.C.P. 12.

9 Section 1365 of the Clean Water Act only authorizes a civil action against a person who  
 10 is alleged “to be in violation of” an effluent standard or order from the EPA or against the EPA  
 11 (or state agency) who has allegedly failed to take an action that is not discretionary under the  
 12 Act. 33 U.S.C. § 1365(a)(1) & (2). In both instances, a plaintiff must allege that the defendant  
 13 is violating the Clean Water Act at the time the complaint is filed. The TAC, however, fails to  
 14 allege a current violation of the CWA based on an existing discharge from the Ski Run Facility –  
 15 nor could plaintiffs do so as the monopine has not been built yet and does not exist. Instead, the  
 16 TAC relies on allegations of discharges that they assert “will inevitably occur from the Verizon  
 17 monopine once built.” TAC at ¶ 165. Even assuming plaintiffs’ allegations about future  
 18 discharges are true (they are not), the Clean Water Act simply does not provide for judicial  
 19 review based on plaintiffs’ belief that a violation will occur in the future. 33 U.S.C. § 1365.  
 20 Similarly, to the extent count 5 includes allegations that the permit for the Ski Run Facility was  
 21 flawed, and the Court were to accept those allegations as true, the allegations would still fail to  
 22 state a claim under 33 U.S.C. § 1365 because they do not include an allegation of a current  
 23 violation.

24 **B. Count 9 fails to state a claim under the ADA or the FHAA, which in**  
 25 **any event do not apply to Verizon or Mr. Nel.**

26 In count 9, plaintiffs assert claims under the Americans with Disabilities Act (42 U.S.C.  
 27 § 12101 *et seq.*) (“ADA”) and the Fair Housing Amendments Act of 1989 (42 U.S.C. §§ 3601 *et*  
 28 *seq.*) (the “FHAA”). They allege that these statutes required TRPA and the City to deny or

1 revoke permits for wireless facilities based on their RF emissions, and Verizon to shut down or  
 2 remove the 2018 Small Cell, all as a “reasonable accommodation” to plaintiffs Eisenstecken and  
 3 Benedict. TAC, ¶¶ 202-19. As noted above, plaintiffs fail to state a cause of action under either  
 4 statute because the proposed accommodation is “per se unreasonable.” *Wolf v. City of Millbrae*,  
 5 *supra*, 2021 WL 3727072, \*4. In addition, as explained in more detail in the City’s motion to  
 6 dismiss, the FHAA does not apply to this case, because neither Verizon nor any other defendant  
 7 was involved in the sale or rental of a dwelling. *Salisbury v. City of Santa Monica*, 998 F.3d  
 8 852, 858 (9th Cir. 2021); *Wolf, supra*, 2021 WL 3727072, \*6.

9 Furthermore, Title II of the ADA<sup>7</sup> does not apply to Verizon or Mr. Nel. That statute  
 10 applies only to discrimination against disabled individuals by a “public entity.” 42 U.S.C. §  
 11 12132. A “public entity” is a “state or local government,” or “any . . . instrumentality of a State  
 12 or States or local government.” 42 U.S.C. § 12131(1). Thus, Verizon is a “public entity” only if  
 13 it is an “instrumentality” of a state or local government. Plaintiffs allege no legal or factual basis  
 14 to support such a conclusion, but merely assert that Verizon is a “public entity” because it is  
 15 considered a public utility in certain regulatory contexts. TAC ¶¶ 205, 210. This is a baseless  
 16 argument, as plaintiffs admit that Verizon is “technically a private entity” (*id.*, ¶ 210), and that  
 17 TRPA cannot delegate its governmental functions to “private, self-interested commercial  
 18 companies such as Verizon.” *Id.*, ¶ 143. Of course, Mr. Nel, as a private individual, is also not a  
 19 “public entity,” and therefore neither he nor Verizon have any obligations to any plaintiff under  
 20 the ADA.<sup>8</sup>

21 **C. Claims 10 through 13 fail to state any viable claim, even if they were**  
 22 **not preempted (which they are).**

23 In claims 10 through 13, plaintiff Benedict asserts state-law tort claims for public and  
 24 private nuisance, trespass, and assault against various defendants. Claim 10 names TRPA, the  
 25 City, Verizon, and Mr. Nel, claim 11 names only the first three (omitting Mr. Nel), and claims

26 \_\_\_\_\_  
 27 <sup>7</sup> Plaintiffs do not attempt to allege any claim under any other part of the ADA.

28 <sup>8</sup> It is not clear from the TAC whether the plaintiffs allege that Mr. Nel is liable under the ADA, so  
 we address that issue in an abundance of caution.

12 and 13 name only Verizon as a defendant. Regardless of the particular defendants named, none of these counts alleges a plausible claim for relief. The only “facts” alleged are based on the allegedly harmful RF emissions from the Ski Run Facility (which has not been built) and the 2018 Small Cell, which means these claims are preempted as discussed above. But quite apart from federal preemption, these counts fail to state a viable claim purely as a matter of state law.

**1. RF emissions within FCC limits will not support tort liability under California law.**

In California, alleged impacts of electromagnetic radiation such as RF emissions will not support tort liability. In *San Diego Gas & Electric Co. v. Superior Court*, 13 Cal. 4th 893, 935 (1996) (“*SDG&E*”), the plaintiff alleged that the utility was liable for trespass because it “intended to and did emit electromagnetic radiation onto plaintiffs’ property without plaintiffs’ consent.” The California Supreme Court held that “plaintiffs do not and cannot state facts sufficient to constitute a cause of action for trespass under the substantive law of this state,” which does not permit trespass liability for intangible intrusions such as noise, odor, or light. *Id.*, 13 Cal. 4th at 935. The court held that “electric and magnetic fields arising from powerlines are wholly intangible phenomena . . . akin to television and radio waves,” and such intangible intrusions will support a trespass claim only when they cause “*physical* damage to [plaintiff]’s property.” *Ibid.* (emphasis in original). There are no such allegations in the TAC.

As plaintiffs concede, both their public and private nuisance claims require plaintiff Benedict to plausibly allege that Verizon’s RF emissions cause an *unreasonable* interference with his use and enjoyment of his property. TAC, ¶¶ 225, 236. Based on this requirement, both *SDG&E* and *Wolf, supra*, dismissed nuisance claims based on electro-magnetic fields. As the court explained in *SDG&E*, in order for the plaintiffs to prevail on their private nuisance claim, “the trier of fact would be required to find that *reasonable persons viewing the matter objectively* (1) would experience a substantial fear that the fields cause physical harm and (2) would deem the invasion so serious that it outweighs the social utility of SDG&E’s conduct.”



1 *SDG&E*, 13 Cal. 4th at 939 (emphasis added).<sup>9</sup> Or, as the court in *Wolf* summarized,  
 2 “California’s high court affirmed that the interference posed by electromagnetic frequency  
 3 emissions is determined by an objective standard without reference to the idiosyncrasies of the  
 4 plaintiff.” 2021 WL 3727072, \*8.

5 In dismissing Wolf’s nuisance claim, the court rejected his reliance on the so-called  
 6 “Building Biology Standards” invoked by plaintiffs here, noted the ubiquity of cellular  
 7 infrastructure and the lack of any allegation that Wolf’s neighbors “suffer even a degree of his  
 8 same symptoms,” and held that “Wolf therefore cannot meet the necessary objective standard to  
 9 establish nuisance.” *Ibid.* Nor can plaintiff Benedict, who affirmatively alleges that he is  
 10 uniquely vulnerable to RF emissions (TAC, ¶¶ 228), and despite the continuous operation of the  
 11 2018 Small Cell for “the past three and one- half years” (*id.*, ¶ 94), is the only one complaining  
 12 about it.

13 The court in *SDG&E* relied on the same objective standard to affirm dismissal of a  
 14 nuisance claim based on the plaintiffs’ fear of being harmed by electromagnetic radiation from  
 15 power lines. The California Supreme Court held the trier of fact could not possibly make the  
 16 required findings, because they would conflict with the findings of the California Public Utilities  
 17 Commission (which has primary authority under state law to regulate electromagnetic fields  
 18 from power lines) “that the available evidence does *not* support a reasonable belief that 60 Hz  
 19 electric and magnetic fields present a substantial risk of physical harm. . . .” 13 Cal. 4th at 939  
 20 (emphasis in original).

21 The same rationale bars plaintiffs’ nuisance and assault claims here. To hold any  
 22 defendant liable under either theory, the Court or a jury would have to find that RF emissions at  
 23 levels deemed safe by the FCC (the agency charged with making that determination) are in fact  
 24 harmful. Quite apart from federal preemption, such a claim is not viable under California law.

25  
 26  
 27 <sup>9</sup> The assault claim requires a similar objective finding, that “plaintiff reasonably believed he was  
 28 about to be touched in a harmful or offensive manner.” *Robles v. Agreserves, Inc.*, 158 F.Supp.3d  
 952, 985-86 (2016)



1                                   **2. Plaintiffs’ nuisance claims are barred by**  
 2                                   **California Civil Code Section 3482.**

3           Finally, any nuisance claim is barred by California Civil Code section 3482, which  
 4           provides that “nothing which is done or maintained under the express authority of a statute can  
 5           be deemed a nuisance.” Under this statute, courts have routinely held that work authorized in a  
 6           permit or other governmental approval cannot constitute a nuisance. *See, e.g., Public Watchdogs*  
 7           *v. Southern California Edison Company*, 2019 WL 6497886, \*17 (S.D. Cal. 2019) (collecting  
 8           cases and holding that “[t]o the extent that Plaintiff’s nuisance cause of action is predicated on  
 9           the Private Defendants’ actions pursuant to licenses and certificates issued by the NRC, it is  
 10          barred by Section 3482.”). The nuisance claims in counts 10 and 11 are based entirely on the  
 11          operation (or planned operation) of wireless facilities pursuant to permits issued by TRPA and  
 12          the City, and are thus barred as a matter of law by Section 3482.

13                   **III. All claims regarding the City’s approval of the Ski Run Facility, TRPA’s or the**  
 14                   **City’s approval of the 2018 Small Cell, or any other existing wireless facilities**  
                   **are untimely.**

15          Any action challenging a TRPA decision – whether to adopt or amend a regulation or  
 16          approve or deny a permit – “shall be commenced within 60 days after final action by the  
 17          agency.” Compact, Art. VI(j)(4). Similarly, any action to “attack, review, set aside, void, or  
 18          annul any decision on” a land use permit issued by the City must be filed and served on the City  
 19          within 90 days after the City’s decision to issue the permit. Cal. Govt. Code § 65009(c)(1)(E).  
 20          This includes challenges based on alleged conflicts of interest, or any other aspect of “the  
 21          proceedings, acts, or determinations taken, done, or made prior to” the decision to grant the  
 22          permit. California Govt. Code § 65009(c)(1)(F). Taken together, these provisions bar any claim  
 23          regarding the City’s approval of the Ski Run Facility, TRPA’s or the City’s approval of the 2018  
 24          Small Cell, or any other existing wireless facility.

25          Plaintiffs admit that the City approved the Ski Run Facility in January 2020, and both the  
 26          City and TRPA issued permits for the 2018 Small Cell in 2018. TAC, ¶¶ 77, 94, 213. They do  
 27          not allege that TRPA approved any existing wireless facilities within 60 days before the TAC  
 28

1 was filed, but nevertheless attack TRPA's prior approval of every wireless facility within its  
 2 jurisdiction on various grounds. Counts 1-13 of the TAC all rest in part on allegations regarding  
 3 either the City's approval of the Ski Run Facility, the 2018 Small Cell or other, unspecified  
 4 facilities approved at unspecified dates before this action was filed, and must therefore be  
 5 dismissed as untimely. Compact, Art. VI(j)(4); California Govt. Code section 65009(c)(1)(E).  
 6 This includes all allegations regarding alleged "piecemealing," conflicts of interest, or other  
 7 claims to the extent they rely on allegations regarding any existing wireless facilities.

8 Plaintiffs do not (and cannot) allege any way to avoid the limitations bar with respect to  
 9 TRPA's prior approvals. They do attempt to plead around the issue with respect to the City's  
 10 approval of the 2018 Small Cell and the Ski Run Facility, but that attempt fails. With respect to  
 11 the 2018 Small Cell, they argue that Verizon has violated the terms of the permit, rather than  
 12 directly challenging the permit itself. This effort fails for two reasons. First, the alleged  
 13 violation is based solely on the claim that the facility's RF emissions are harming plaintiff  
 14 Benedict (TAC ¶¶ 106-7), and is therefore preempted by the TCA as discussed above. 47 U.S.C.  
 15 § 332(c)(7)(B)(iv). Second, because plaintiffs challenge the very activity authorized by the  
 16 permit (operation of the small cell), their argument that it should be revoked is in fact a  
 17 challenge to the permit itself. As explained in more detail in the City's motion to dismiss, courts  
 18 have consistently rejected all attempts to plead around the 90-day statute. No matter how it is  
 19 framed, any claim that is in fact a challenge to a land use approval is subject to the 90-day  
 20 statute. *See Honig v. S.F. Planning Dept.*, 127 Cal.App.4th 520, 528 (2005).

21 Plaintiffs attempt to plead around the limitations bar with respect to the City's approval  
 22 of the Ski Run Facility by alleging that the City's approval has expired because Verizon did not  
 23 "utilize" it within a year after it was issued, as required by a condition of approval. TAC, ¶¶ 75-  
 24 84. This claim is not plausible, given plaintiffs' admissions that "utilizing" the permit required  
 25 only that Verizon "move forward with its application for a necessary permit from TRPA," and  
 26 that it did so by "emailing a copy of the City permit to TRPA." TAC, paragraphs 79, 85. *See*  
 27 *Orellana v. Mayorkas*, 6 F.4th 1034, 1043 (9th Cir. 2021) (affirming dismissal because, given  
 28

1 plaintiff's admissions, "the complaint itself undermines Orellana's theory of the case and renders  
2 it implausible").

3 Plaintiffs attempt to undercut the force of their admission by failing to quote the email in  
4 question or attach it to the complaint, but the Court may take judicial notice of it as a matter of  
5 public record. *See* TRPA's Request for Judicial Notice (ECF no. 66), Exh. 13. As the email  
6 reveals, within two weeks of receiving the City permit, Verizon did more than just send a copy  
7 of the permit to TRPA. It relied on the permit to "move forward with its application" to TRPA  
8 by asking that TRPA "please advise when you can have this item on agenda for a hearing with  
9 your organization." *Ibid.* Plaintiffs also fail to acknowledge that the South Lake Tahoe City  
10 Attorney determined that Verizon had "utilized" the City permit as required by the condition of  
11 approval. *Id.*, Exh. 14.

12 In short, plaintiffs' argument that the City permit expired is contrary to their own  
13 admissions, and to matters of public record of which the Court may take judicial notice, and is  
14 thus not plausible. *Orellana, supra.* For this reason, there is no need for the Court to reach  
15 plaintiffs' related argument that the allegedly expired permit from the City somehow made  
16 TRPA's separate approval of the Ski Run Facility unlawful. TAC ¶¶ 85-86. In any case, even  
17 assuming their expired permit argument were not foreclosed (as it is), plaintiffs' underlying  
18 assumption that TRPA could not approve the facility without a current approval from the City is  
19 not supported by any authority.

20 The Court should dismiss claims 1-13 to the extent they are based on the City's approval  
21 of the Ski Run Facility, the approval or operation of the 2018 Small Cell, or any other existing  
22 wireless facility.

#### 23 **IV. The Court should dismiss with prejudice all claims against Mr. Nel.**

24 Based on the foregoing analysis, the Court has multiple grounds on which to dismiss all  
25 claims against both Verizon and Mr. Nel (as well as the other defendants). We address claims  
26 against Mr. Nel separately only because plaintiffs have refused defendants' request to  
27 voluntarily dismiss Mr. Nel from the case, making it necessary to seek the Court's relief. The  
28

only allegations against Mr. Nel are that he removed trees from his own property, that he directed profane language at plaintiff Eisenstecken and called the police, who intimidated her father (a non-party), and that he cooperated with Verizon in its successful effort to obtain the City's and TRPA's approval of the Ski Run Facility. TAC, ¶¶ 21, 39, 88, 196. None of these allegations support any viable claim for relief.

**A. All claims based on defendant Nel's tree removal are moot and in any event fail to state a plausible claim for relief.**

The TAC includes allegations about the alleged impacts of Mr. Nel's removal of 31 trees from his property, but plaintiffs do not allege that TRPA's approval of the tree cutting violated any specific provision of the Compact or regulations. Instead, they cite it as evidence of "piecemealing" (TAC, ¶¶ 89-92), and allege in conclusory fashion that TRPA's decision to consider it separately from the Ski Run Facility application was "arbitrary and capricious, lacking in evidentiary support, and was done in [sic] manner that failed to proceed as required by law in violation of the Compact, Article VI(j)(5)." *Id.*, ¶ 92. As discussed in TRPA's motion to dismiss, this claim is moot. In addition, it fails to state a plausible claim for relief.<sup>10</sup>

Plaintiffs do not state a plausible claim for relief based on the tree cutting because they admit that substantial evidence supported TRPA's decision to treat it separately from the application for the Ski Run Facility. Specifically, plaintiffs admit that the City's Fire Inspector *ordered* Mr. Nel to remove the trees "because the inspector determined they presented a fire hazard in this wildfire-susceptible zone," that TRPA's forester chose the specific trees to be cut, and that TRPA issued a permit citing "defensible space and safety hazard" as the reason for cutting the trees. TAC ¶¶ 21, 88. These admitted facts constitute more than substantial evidence to support TRPA's conclusion that the tree-cutting was not related to the cell tower application, and its decision to treat them separately.

<sup>10</sup> Plaintiffs do not challenge the tree cutting in a separate, numbered count, but incorporate these allegations among each of their numbered claims for relief. Accordingly, defendants move to dismiss any claims based upon these allegations, and refer to them as a "claim" for the sake of brevity.

1 As set forth in more detail in TRPA’s motion to dismiss, to overturn TRPA’s decision,  
 2 plaintiffs would have to show a “prejudicial abuse of discretion,” which means “the agency has  
 3 not proceeded in a manner required by law or if the act or decision of the agency was not  
 4 supported by substantial evidence in light of the whole record.” Compact Art. VI(j)(5).  
 5 Plaintiffs do not allege either, aside from their formulaic allegation that TRPA’s decision was  
 6 “lacking evidentiary support” and “failed to proceed as required by law.” TAC, ¶ 92. This is a  
 7 textbook example of “[t]hreadbare recitals of the elements of a cause of action, supported by  
 8 mere conclusory statements” condemned in *Ashcroft*, 556 U.S. at 678.

9 Given their admissions that the tree cutting was ordered by the City and approved by  
 10 TRPA for reasons that had nothing to do with the cell tower application – and has been  
 11 completed – plaintiffs cannot amend to state a plausible cause of action on this basis. Any  
 12 claims based on Mr. Nel’s tree removal must therefore be dismissed with prejudice.

13 **B. No other allegations against Mr. Nel state a plausible claim for**  
 14 **relief.**

15 Mr. Nel denies using profanity toward or calling the police on plaintiff Eisenstecken or  
 16 her family, but even if these allegations were true, they do not support a plausible claim for  
 17 relief. In fact, plaintiffs do not base any claim for relief on Mr. Nel’s language or calling the  
 18 police (nor could they, given the First Amendment), but rather make these allegations in  
 19 connection with their unrelated conflict of interest claim against TRPA and its staff and officials.  
 20 TAC, ¶ 196). In addition, claim 10, the only other claim in which Mr. Nel is named, alleges – in  
 21 the unnumbered heading – that he is liable based solely on his refusal to “extend a reasonable  
 22 accommodation to prevent the installation of” the Ski Run Facility. TAC, pp. 101-2. As  
 23 discussed above, Mr. Nel is a private individual and not a “public entity” subject to the ADA, so  
 24 he has no duty to extend a “reasonable accommodation” to any plaintiff. 42 U.S.C. § 12131(1).  
 25 Furthermore, plaintiffs do not explain how a “reasonable accommodation” could possibly relate  
 26 to a state-law nuisance count, which in any event is not viable for the reasons set forth above. In  
 27  
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1 short, plaintiffs assert no conceivable basis for liability against Mr. Nel, and all claims against  
2 him must be dismissed with prejudice.

3 **V. The entire complaint should be dismissed for violation of Rule 8.**

4 The TAC is needlessly long, filled with conclusory allegations, and confusing as to the  
5 nature of the claims raised. In other words, it violates Rule 8, which requires “a short and plain  
6 statement of the claim showing that the pleader is entitled to relief,” and that “each allegation must  
7 be simple, concise, and direct.” Rule 8(a)(2) and (d)(1). Plaintiffs have steadily expanded the  
8 length of their complaint, from 35 pages (ECF no. 1), to 41 pages in their FAC, 80 pages in their  
9 SAC, and now 114 pages in the TAC.

10 But the problem goes far beyond overall length. The TAC is bloated with needless, often  
11 irrelevant detail. For example, plaintiffs allege repeatedly that the threat of a cell tower being  
12 approved caused the sale of the Eisenstecken family residence at a “distressed” price, but admit  
13 that the residence was owned by plaintiff Eisenstecken’s father – a non-party – so what he realized  
14 on the sale is irrelevant. TAC, ¶¶ 21-22, 25-26, 196, 214. They also devote roughly seven pages  
15 to describing in great detail the correspondence resulting from their request for a so-called  
16 “reasonable accommodation” (shutting down a functioning cell site), when it would have sufficed  
17 to simply state that they made the request, to whom, and how it was resolved. TAC, ¶¶ 98-110.  
18 There are many other examples, including allegations of a conflict of interest against a hearing  
19 officer who did not even make the decision in question (*id.*, ¶¶ 113-16), needless detail about the  
20 history and legal status of the City (*id.*, ¶¶ 32-33), and a long discussion of alleged “harassment”  
21 by defendant Nel and other unrelated allegations in the conflict of interest claim, to which they  
22 have no possible relevance (*id.*, ¶ 196).

23 Aside from the burden of having to respond to so many irrelevant allegations, many of the  
24 numbered paragraphs run on for a page or more. *See, e.g.*, TAC ¶¶ 11, 13, 15, 16, 20, 21. Having  
25 to admit or deny dozens of allegations in a single paragraph is an unreasonable burden on  
26 defendants.

27 Moreover, plaintiffs take 69 pages to get to their first claim for relief, and then compound  
28

1 the problem by incorporating every previous allegation into each claim for relief. This is a  
 2 practice known as “shotgun pleading,” which this Court has repeatedly condemned because “such  
 3 a practice does not provide adequate notice for purposes of Rule 8.” *Caruso v. Hill*, 2020 WL  
 4 4018141, at \*11 (E.D. Cal. July 15, 2020). *See also Hamilton v. County of Madera*, 2021 WL  
 5 1577819, \*6 (E.D. Cal. 2021) (recommending dismissal of complaints as “improper ‘shotgun’  
 6 pleadings that do not contain ‘a short and plain statement of the claim showing that the pleader is  
 7 entitled to relief.’ This basis alone constitutes a violation of Rule 8.”), *R&R adopted*, 2021 WL  
 8 2651754 (E.D. Cal. 2021).

9         Given the foregoing, it is often impossible to discern the nature of the claims or against  
 10 which defendant they are asserted. For example, plaintiffs repeatedly complain that TRPA is  
 11 issuing “blanket” permits for wireless facilities, and has allowed “the entire Tahoe Region to be  
 12 saturated with cell towers, small cell wireless facilities, and earth and base stations” (TAC, ¶ 131),  
 13 but challenge only two specific facilities in the TAC. Claim 4 alleges that all actions taken or  
 14 approved by TRPA must be consistent with TRPA’s Regional Plan, and the “erratic policies and  
 15 actions adopted by the TRPA are in direct contravention of and in conflict with this basic axiom of  
 16 California, Nevada, and federal land use planning laws, and a large number of judicial  
 17 precedents,” but fails to identify either the “erratic policies” or the laws or judicial precedents they  
 18 allegedly violate.

19         In other claims, it is impossible to discern which defendants are targeted, and for what  
 20 relief. Claim 9, alleging violations of the ADA and FHAA, does not name either Verizon or Mr.  
 21 Nel in the lengthy heading (TAC, p. 96), but does include allegations against Verizon in the body  
 22 of the count (*id.*, ¶¶ 204-6, 210, 212-214). Claim 10, for public nuisance, names defendant Nel in  
 23 the heading (TAC, p. 101), but he is not mentioned in the body of the count, aside from some of  
 24 the previous 219 paragraphs incorporated by reference.

25         Critically, it is also unclear which defendants are targeted in plaintiffs’ request for  
 26 compensatory and punitive damages. At paragraph 8 of the TAC, plaintiffs state they seek  
 27 damages against Verizon, TRPA, and the City, while the tort claims in counts 10-13 seek damages  
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1 without specifying from which defendant(s) (TAC, ¶¶ 233, 246, 255, 263), and the prayer for  
2 relief requests damages only from Verizon (*id.*, p. 113, ¶¶ 17-18).

3 All of these problems put unreasonable burdens on the Court and the defendants. The  
4 Ninth Circuit has upheld dismissals for violation of Rule 8 under less egregious circumstances.  
5 *See, e.g., Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 415 (9th Cir. 1985) (upholding a Rule 8(a)  
6 dismissal of a complaint that “exceeded 70 pages in length, [and was] confusing and conclusory”).  
7 As the court explained in *McHenry v. Renne*, 84 F.3d 1172, 1179–80 (9th Cir. 1996):

8 Prolix, confusing complaints . . . impose unfair burdens on litigants and  
9 judges. As a practical matter, the judge and opposing counsel, in order to  
10 perform their responsibilities, cannot use a complaint such as the one  
11 plaintiffs filed, and must prepare outlines to determine who is being sued  
12 for what. Defendants are then put at risk that their outline differs from the  
13 judge’s, that plaintiffs will surprise them with something new at trial which  
14 they reasonably did not understand to be in the case at all. . . . The judge  
15 wastes half a day in chambers preparing the “short and plain statement”  
which Rule 8 obligated plaintiffs to submit. He then must manage the  
litigation without knowing what claims are made against whom. This leads  
to discovery disputes and lengthy trials, prejudicing litigants in other case[s]  
who follow the rules, as well as defendants in the case in which the prolix  
pleading is filed.

16 In *McHenry*, the Ninth Circuit upheld dismissal of a complaint that was “only” 53 pages  
17 long, observing that it “mixes allegations of relevant facts, irrelevant facts, political argument, and  
18 legal argument in a confusing way.” 84 F.3d at 1174. That is a fair description of the TAC here.  
19 The Court should dismiss it pursuant to Rules 8 and 41(b). Based on the arguments above, the  
20 dismissal should be with prejudice.

21 If the Court does allow a fourth amended complaint, defendants request that it be limited to  
22 40 pages, as plaintiffs have demonstrated that they will continue to ignore Rule 8 without firm  
23 guidance from the Court. *See Olfati v. City of Sacramento*, 2021 WL 5204300, \* 2 (E.D. Cal.  
24 2021) (dismissing complaint for violation of Rule 8, and imposing 40-page limit on further  
25 amendment).



**CONCLUSION**

The TAC is fatally flawed in that no set of facts exist to state a plausible claim for relief. Accordingly, any attempt to further amend would be futile, and the complaint would still be subject to dismissal. For other grounds for dismissal, Verizon and Mr. Nel refer the Court to the concurrent motions to dismiss filed by TRPA and the City, in which, based on the facts of this case, Verizon and Mr. Nel join. For all the foregoing reasons, Verizon and Mr. Nel respectfully request that this Court dismiss the entire TAC with prejudice.

Dated: July 25, 2022

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